UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
800 K STREET, NW, SUITE 400N
WASHINGTON, DC 20001-8002

DATE: April 28, 1998

CASE NO: **97-OFC-21**

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEPARTMENT OF LABOR,

Complainant,

v.

SYSCO FOOD SERVICES OF PORTLAND, INC.

Respondent.

DECISION AND ORDER APPROVING CONSENT DECREE

This case arises under Executive Order 11246, as amended (30 Fed. Reg. 12319 and 32 Fed. Reg. 14303) ("Executive Order 11246") and the regulations issued at 41 C.F.R. §§ 60-1.26 & 60-30.

Procedural History

The Administrative Complaint in this matter was filed by the Office of Federal Contract Compliance Programs ("OFCCP") on September 23, 1997. The complaint alleged that Sysco Food Services of Portland, Inc. ("SYSCO") had violated Executive Order 11246 by failing to consider for employment qualified female applicants for warehouse positions. On October 3, 1997, SYSCO filed its answer to the complaint, generally denying OFCCP's allegations.

On November 14, 1997, the parties submitted a Joint Motion For Hearing On And Entry of Decree and a Consent Decree. The parties requested that I accept for consideration the consent decree, and prior to approval of the settlement, provide International Brotherhood of Teamsters, Local 162 ("Local 162"), with notice and an opportunity to be heard on its provision.

Pursuant to such request, I granted Local 162 thirty days to submit any objections which it may have concerning the consent decree in this matter. The parties were likewise granted thirty days from the date Local 162 made its submission to respond to any objections. On December 11, 1997, Local 162 submitted a Petition to Participate as a Party but failed to clearly set forth specific

objections which it has concerning the proposed consent decree. Local 162 was thus ordered to submit within fifteen days specific objections, and on February 23, 1998, such a submission was in fact made. Opposition responses were filed to Local 162's objections by SYSCO and OFCCP on March 9, 1998, and March 10, 1998, respectively.

Findings of Fact

A. Initial Complaint and Negotiations

The Complainant's allegations of discrimination arose from a compliance review which found that SYSCO, during the period of January 1, 1992 through the present, has utilized employment practices, including but not limited to hiring and initial job placement practices, which discriminated against female employees on the basis of their gender. It was further found that, during the same period, SYSCO: (1) administered application and hiring processes for positions in its warehouse differently for female and male applicants; (2) failed to take affirmative action to employ and advance women in the workplace; and (3) failed to identify and provide complete relief including back pay where appropriate for female employees and applicants for employment who have suffered the effects of SYSCO's discriminatory practices. The OFCCP found that the above acts and practices violated Executive Order 11246 and the regulations promulgated thereunder, and violated the Respondent's contractual obligations to the Federal Government.

Initially, Complainant sought a decision and order, pursuant to 41 C.F.R. Part 60-30, permanently enjoining Respondent, its officers, agents, servants, employees, successors, divisions, parent companies, subsidiaries, and those persons in active concert or participation with it, from: (1) failing and refusing to comply with the requirements of Executive Order 11246 and the rules and regulations issued pursuant thereto as alleged; (2) administering application and hiring processes differently for men and women; and (3) failing to identify and provide complete relief including lost wages, interest, front wages, and all other fringe benefits of employment, including but not limited to, retroactive seniority, promotional and transfer opportunities to female applicants for warehouse positions who have been discriminated against in hiring on the basis of their gender. Further, Complainant prayed for an order pursuant to 41 C.F.R. 60-30.27, and 60-30.30, canceling all of Respondent's government contracts and subcontracts, and those of its officers, agents, successors, divisions, parent companies, subsidiaries and those persons in active concert or participation with it, in accordance with Section 209(a)(5) of Executive Order 11246; declaring said persons and entities ineligible for the extension or modifications of any such existing government contract or subcontract; and debarring said persons and entities form entering into future government contracts or subcontracts, until such time as Respondent satisfies the Deputy Assistant Secretary for Federal Contract Compliance Programs that it has corrected past acts of non-compliance and that it is currently in compliance with the provisions of Executive Order 11246 and the regulations promulgated thereunder.

Thereafter, the parties, through arms length negotiations, arrived at an agreement. The Consent Decree was filed on November 14, 1997. Both OFCCP and SYSCO desire to resolve this action and all issues raised herein without further time and expense of contested litigation. They have thus entered into a complete and satisfactory compromise and settlement of the claims. Under the

provisions of the Consent Decree, SYSCO agrees, without admitting liability, that it will pay to the rejected female applicants identified by OFCCP a sum certain in settlement of back pay, and that it will make job offers to these women until five offers have been accepted or the list of rejected applicants has been exhausted. Women who accept these job offers and complete their probationary period will receive seniority retroactive to their initial application to SYSCO.

B. The Union's Participation

Seniority at SYSCO is governed by a collecting bargaining agreement between the company and Local 162, International Brotherhood of Teamsters ("Local 162"). OFCCP's regulations at 41 C.F.R. 60-30.24(a)(1) permit any labor organization which is signatory to a labor agreement which is implicated in an action to enforce Executive Order 11246 to intervene in that action as of right. On November 25, 1997, this Office ordered Local 162 to submit any objections which it may have concerning the proposed consent decree in this matter. On December 11, 1997, Local 162 submitted a Petition to Participate as a Party but failed to clearly set forth specific objections which it has concerning the proposed consent decree. Thereafter, Local 162 complied with an Order requiring it to submit within specific objections it has to the proposed consent decree. OFCCP and SYSCO were afforded fifteen days from the date Local 162 made its submission to respond to its objections. Both parties timely responded to Local 162's objections. The union filed a Reply to the responses of SYSCO and OFCCP on March 13, 1998.

Local 162 objects to the specific provisions in the Consent Decree which provide for non-monetary relief, which allows each qualified female applicant hired "who completes her probationary period to be credited with full seniority and with benefits based upon seniority retroactive to the date of her initial application." Local 162 further contends that the Decree makes no meaningful distinction in terms of the equitable relief to be granted between "benefit" type seniority and "competitive" type seniority. The union thus concludes that such failure by this Office to make this distinction would be violating the discretion of the Department of Labor "to do equity in framing a remedy for violations of the Executive Order."

C. The Consent Decree

On November 14, 1997, Complainant and SYSCO filed a Consent Decree for approval by this Office. Upon approval, the Decree shall constitute full and final settlement and resolution of all issues, actions, causes of action and claims arising, or that could have arisen, out of the administrative complaint filed in this matter. Further, the Decree shall be binding upon the parties as to all issues, actions, causes of action and claims within the scope of the administrative complaint which have been or could have been advanced by OFCCP.

Subject to the performance by SYSCO of all duties and obligations contained in the Decree, all alleged deficiencies identified in the administrative complaint shall be deemed fully resolved. Under the Decree, SYSCO agrees to pay the total sum of $55,000 in full settlement of all claims for back pay and other monetary relief to the affected class of qualified female applicants for entry level warehouse positions during the period from January 1, 1992, to December 31, 1992. SYSCO will treat two-thirds of each class member's share of the settlement fund as a compromise of any claims for lost wages, and will pay the Internal Revenue Service the employer's share of social security

withholding attributable to that share. SYSCO also agrees to notify the affected class that she may reactivate her application for a warehouse position within four weeks of receipt of the letter by submitting an updated application. If the recipient is hired and completes a probationary period, she will be credited with full seniority and with benefits based upon seniority retroactive to the date of her initial application. The Decree shall not constitute an admission by SYSCO as to any violation of the Executive Order or any other wrong doing.

Conclusions of Law

In citing to *OFCCP v. Carolina Freight Carriers Corporation*[1] and *Williams v. Vukovich*[2], the Administrative Law Judge in *OFCCP v. Cambridge Wire, Inc. and United Stealworkers of America*[3] set forth a three step process used for approval of consent decrees. As expressed by the ALJ in *Cambridge Wire*, the process is as follows:

> ***First***, a consent decree should be preliminarily approved so long as the compromise embodied within the decree is not illegal or tainted with collusion. ***Second***, the decree should be evaluated for whether it is fair, adequate and reasonable. A consent decree that has been preliminarily approved is presumptively reasonable, and any objecting party bears a heavy burden of demonstrating that the decree is unreasonable. Specifically, the court should evaluate whether the proposed consent decree provides adequate relief to the affected class, and whether it is fair to others that it affects. *Carolina Freight, supra.* This inquiry should focus on the terms of the settlement, and the court need consider the merits of the underlying claim only insofar as they give some indication of the adequacy and fairness of the settlement. *Moore v. San Diego*, 615 F.2d 1265, 1272 (9th Cir. 1980). While a third-party to the settlement has the right to be heard regarding the fairness and reasonableness of the consent decree, this right is limited to its presentation of facts pertaining to the impact of the decree upon its members. Carolina Freight, supra. It is well-settled that an intervenor may not block approval of a proposed consent decree by withholding its consent thereto. *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) (intervenor union cannot block approval of a consent decree by withholding its consent where the decree imposes no legal duties or obligations on the union); *see also, e.g., Black Fire Fighters Association v. City of Dallas*, 805 F.Supp. 426, 428 (N.D.Tex. 1992). Absent a showing that the decree contains provisions that are unreasonable, unlawful or inequitable, the decree should be approved as entered. *Carolina Freight, supra*. As a ***final step***, the court must consider

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[1] 93-OFC-15 (ALJ October 20, 1993).

[2] 720 F.2d 909 (6th Cir. 1983)

[3] 94-OFC-12 (ALJ December 18, 1995).

whether the consent decree is consistent with the public interest.

Cambridge Wire, supra at p.5 (emphasis added).

In this case, Local 162 has not argued, nor do I find anything in the record supporting a claim, that the compromise embodied within the proposed consent decree is per se illegal or tainted with collusion. Therefore, I find that the decree is entitled to preliminary approval. Local 162 does contend, however, that the terms of the decree are unreasonable and unfair to the incumbent employees that it represents in that it makes no meaningful distinction in terms of the equitable relief granted between "benefit" type seniority and "competitive" type seniority. Specifically, the union argues that the scope of the decree's priority hire provisions, with their attendant retroactive seniority awards, exceeds its purpose as a make-whole remedy. It further alleges that the decree will make an exception to the Collective Bargaining Agreement, abridging the seniority rights which are reserved to current employees. In the very least, Local 162 believes that a remedy should be framed which would prevent incumbent employees from being laid off so long as any of the victim employees are still employed.

A. Whether the consent decree's priority hire provisions exceed the scope of remedies permissible in an employment discrimination claim.

It is well-established that the granting of retroactive seniority as part of a consent decree addressing discriminatory hiring is an appropriate and important method by which to make whole the victims of past discriminatory employment practices. *Franks v. Bowman Transportation Co. Inc.*, 424 U.S. 747, 770 (1976) (noting that the award of such seniority is necessary to restore discriminatees to the position they would have occupied absent the discriminatory practice). Further, such relief may be granted even though it may adversely affect the relative seniority that had already been awarded to incumbent employees pursuant to a collective bargaining agreement. *Id*. (noting that the award of retroactive seniority in no way deprives incumbent employees of rights conferred by the employment contract); *see Cambridge Wire, supra; see also E.E.O.C. v. Safeway Stores, Inc*., 714 F.2d 567, 577 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

Nevertheless, such remedial relief should be closely tailored to the purpose of making whole those class members who would have filled vacancies had there been no discrimination, and should not provide a windfall to the class members at the expense of the employer, the union or the incumbent employees. *Ingram v. Madison Square Garden Center, Inc*., 709 F.2d 807, 812 (2nd Cir. 1983), *cert. denied*, 464 U.S. 937 (1983). This is particularly true because the imposition of retroactive seniority is certain to have a deleterious effect on relations between the presently employed laborers and the priority hires who will be granted automatic seniority over them. *Id*., 709 F.2d at 813. On the other hand, while it is impossible to fashion make-whole relief without in some way diminishing the expectations of some of the current employees, such a result is acceptable so far as such expectations are based on the employer's pre-decree, discriminatory employment practices which caused the underemployment of females which the decree is designed to correct. *Franks, supra*, 424 U.S. at 777 (holding that the sharing of the burden of past discrimination by incumbent employees is "presumptively necessary"); *Williams, supra*, 720 F.2d at 922. Further, a

court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial. *Local No. 93, supra*, 478 U.S. at 525.

I find that Complainant has articulated a plausible rationale for requiring that SYSCO award priority hire status to the affected class. Generally, gender-conscious remedies are permissible for the purpose of making whole any person who has been found to have been a victim of employment discrimination. The Supreme Court has consistently held that, where the government has established that an employer has engaged in a pattern or practice of discrimination during a particular period, every minority group applicant who unsuccessfully applied for a job during this period is presumptively entitled to relief, subject to a showing by the company that its earlier refusal to place the applicant in the position was not based upon its policy of discrimination. *Franks, supra*, 424 U.S. at 772; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977).

In the instant case, Complainant has demonstrated that SYSCO engaged in a pattern or practice of discrimination for warehouse positions from 1992 through 1998. The union argues that the presumption set forth in Teamsters would not apply to this showing, however, on grounds that the imposition of gender-conscious remedies require a predicate adjudicatory finding that the employer discriminated. There is nothing, however, in either the *Teamsters* or *Franks* decisions to suggest that their presumption would not apply to a consent decree merely because it was not the product of an adjudication or because it contains a non-admissions clause. Rather, I find that as long as the employer's consent to the decree is based upon the government's statistical showing of a discriminatory pattern or practice which the employer has failed to rebut, it can be inferred that the statistical showing was sufficient to serve as the predicate for voluntary compromise of the resultant discrimination charge, even in the absence of a nonadmissions clause. Accordingly, members of the affected class would be presumptively entitled to the benefit of gender-conscious remedies. *See, e.g., Kirkland v. N.Y. Stat Department of Correctional Services*, 711 F.2d 1117, 1131 & n. 16 (2nd Cir. 1983) (holding that a court may approve an agreement settling a Title VII claim that contained race-conscious remedies even in the absence of a judicial determination of discrimination or admission of liability by the defendant employer, so long as an unrebutted prima facie case of employment discrimination, as established through a statistical demonstration of disparate impact, existed when defendant chose to enter the compromise), *cert. denied*, 465 U.S. 1005 (1984).

The consent decree before me in no way alters the collective bargaining agreement between the union and SYSCO, nor does it impose any legal obligation or duty upon the union. The fact that implementation of the decree would affect the enjoyment of such rights, while relevant to the issue of fairness, would not by itself mandate a legal finding of discrimination. *See Local Number 93, supra*, 478 U.S. at 528-30. The consent decree will not award retroactive seniority to any person who is not presumptively entitled to such relief. Accordingly, I conclude that the granting of retroactive seniority – both "competitive" and "benefit" type – does not exceed the scope of permissible remedies in an employment discrimination case, nor does it require a legal finding or admission of discrimination by SYSCO.

B. Whether the imposition of priority hires by the consent decree is otherwise unfair or

unreasonable with regard to the union's interests.

Although the priority-hire provisions imposed by the consent decree are within the scope of remedies permissible in a case of this sort, it does not necessarily follow that such remedies are fair and reasonable with regard to the interests of SYSCO's incumbent employees. In the instant case, the union argues that it is proper for the employer to make back pay awards and to grant "benefit" type seniority to enhance the employees vacation and other benefits. However, Local 162 vehemently disagrees with granting retroactively a "competitive" type seniority, as such a remedy penalizes innocent employees. Where, as here, the parties to a consent decree have established that gender-conscious remedies are appropriate to address past discrimination, the determination of whether a consent decree is fair and reasonable to a party affected by its remedies focuses not on how these remedies were derived, but rather on the effect such remedies would have on incumbent employees. *Carolina Freight*, supra. This examination is particularly important where, as here, it appears that the union representing the incumbent employees was effectively excluded from participating in the negotiations that produced the decree.

Although primarily rooted in equity, a few well-established threshold determinations apply to a reasonableness inquiry. A consent decree should not contain gender-conscious affirmative relief provisions unless it has been demonstrated that the employer has utilized minorities at a rate less than their proportion in the relevant labor market. *United States v. Weber*, 443 U.S. 193, 203 (1979); *Williams, supra*, 720 F.2d at 922-23 (noting that this statistical disparity "need not be so great as to constitute a prima facie case of discrimination"). When utilized as a remedy, gender-conscious measures must be temporal in nature, and must terminate when the underutilization of minorities has been corrected. Further, gender-conscious remedies cannot bar absolutely the advancement of qualified persons or require the discharge of current employees and their replacement with members of the affected class. *Williams, supra.* None of these factors would preclude approval of the consent decree in the instant case; the priority hire provisions are based upon the complainant's finding of a significant statistical disparity in female hiring for the years 1992 through the present; they are limited to a defined number of class members; and they will not, as implemented, absolutely bar the promotion or require the discharge of non-female employees.

Beyond these considerations, I am left with the "delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *Teamsters, supra*, 431 U.S. at 372. The extent to which the contractual rights of the incumbent employees should determine if and how victims are restored is limited by the basic principles of equity. *Id.*, 431 U.S. at 374-75. Toward this end, the Supreme Court, upon evaluating a consent decree to remedy Title VII employment discrimination, has taken, as its starting point, a presumption in favor of rightful-place seniority relief for the class of discriminatees, and has held that such relief should not be denied "on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases." *Franks, supra*, 424 U.S. at 779 n. 41. In making this determination, the court should consider the number of victims, the number of non-victim employees affected, and the economic circumstances of the industry, insofar as it relates to the possibility of seniority-based furloughs in the future. *Teamsters, supra*, 431 U.S. at

376 n. 62.

I find that no one factor is determinative. Several courts have approved consent decrees on grounds that the number of priority hires who would enjoy retroactive seniority status is small when compared to the number of incumbent employees who would be affected. For instance, in *Moore, supra,* 615 F.2d at 1271, the court concluded that a consent decree that awarded retroactive seniority to a class of twelve applicants would not have an appreciable effect on an incumbent workforce of 590 employees. In *Airline Stewards and Stewardesses Association, Local 550 v. Trans World Airlines, Inc.,* 630 F.2d 1164, 1169 (7th Cir. 1980), *aff'd sub nom., Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385 (1982), the court affirmed entry of a consent decree on grounds that the affected class, which constituted only three percent of the incumbent workforce, could be reinstated in less than one-half year through normal attrition.

Where warranted, courts have also taken into account the employer'sfinancial solvency and the economic circumstances of the industry in determining the probable effects of a consent decree on incumbent employees. For example, in *Romasanta v. United Air Lines, Inc.,* 717 F.2d 1140, 1153 (7th Cir. 1983), *cert. denied,* 466 U.S. 944 (1984), the court held that a consent decree would have an "unusual adverse impact" on incumbent employees where, absent a dramatic improvement in the financial health of the airline industry, there was little likelihood that the employer would be able to recall 1,255 furloughed employees and, at the same time, provide places for 1,400 priority hires without effectively discharging some of the furloughed employees.

From this analysis, I find that at least a few principles emerge. First, it seems clear that some impact on the seniority rights of incumbent employees is to be expected and is therefore acceptable. *See, e.g., E.E.O.C. v. Rath Packing Co.,* 787 F.2d 318, 335 (8th Cir.) (affirming entry of a consent decree that would result in the bumping of long-time employees to less desirable jobs, lower employee morale, and labor-management problems, on grounds that such consequences can be expected in almost any Title VII case), *cert. denied,* 479 U.S. 910 (1986). On the other hand, in cases where the economic circumstances of the employer or the industry suggest that a consent decree might result in the furlough of an incumbent employee whose job would not have been in jeopardy absent the consent decree, such a consent decree is vulnerable to attack as imposing an unusual adverse impact. *See, e.g., Romasanta, supra*.

In the instant case, the consent decree requires SYSCO to provide back pay to the identified rejected applicants. Further, SYSCO will be required to make job offers to these women until five offers have been accepted of the list of rejected applicants has been exhausted. Those who accept the job and complete the probationary period will receive seniority retroactive to their initial application to SYSCO. Accordingly, the decree, on its face, does not necessitate that any current employee be bumped down, transferred, furloughed or terminated.

The only question remaining, therefore, is whether the retroactive seniority award – specifically the "competitive" type – might have an unusual adverse impact on the incumbent class of warehouse employees should SYSCO be required to lay off warehouse employees in the future. However, it is impossible for me to speculate as to the effect of competitive seniority awards as I

have not been presented with any financial information with respect to SYSCO. Given the lack of better data, I find that the compromise is reasonable, particularly in light of the relatively slight chance that this provision will produce an unusual adverse impact on any incumbent employee. Thus, I must accept the declaration that the consent decree represents the product of a fair negotiation process between SYSCO and OFCCP.

Conclusion

I find that the consent decree is rational and fair to the incumbent employees, and provides equitable relief to the class of discrimination victims. I also find that entry of this decree is consistent with the public interest, insofar as voluntary settlement is the preferred method of eliminating employment discrimination. *Williams, supra,* 720 F.2d at 923.

Upon review of the record and the arguments presented by all three parties to this dispute, it appears that the proposed consent decree is a fair, reasonable and adequate resolution of the allegations contained in the administrative complaint, in light of the facts and circumstances of this case. Accordingly, the Consent Decree, incorporated herein, is **APPROVED** and **ADOPTED** in its entirety.

SO ORDERED.

JOHN M. VITTONE
Chief Administrative Law Judge

JMV/pmb